IN THE

Supreme Court of the United States

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October Term, 1971
No. .....

71-640

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF THE STATE OF CALIFORNIA.

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SAN DIEGO UNIFIED SCHOOL DISTRICT,

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THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF THE STATE OF CALIFORNIA.

The San Diego Unified School District (hereinafter, School District) respectfully petitions the United States Supreme Court for a Writ of Certiorari to review the decision of the Court of Appeal for the Fourth Appellate District of the State of California. The decision reversed a judgment of the San Diego Superior Court of California which had dismissed a pupil racial imbalance suit brought by the Attorney General of the State of California (hereinafter, Attorney General).

Opinions Below.

The Opinion of the Court of Appeal is reported at 19 Cal.App.3d 252, 96 Cal.Rptr. 658. A copy of the Opinion is reprinted in the Appendix to this Petition, pp. 1-21. The unreported San Diego Superior Court Memorandum Opinion is also reprinted in the Appendix, pp. 22-41.

Jurisdiction.

The California Court of Appeal's Judgment remanding the case for further proceedings was filed on August 13, 1971. School District's Petition for Rehearing was denied on August 30, 1971, and its Petition for Hearing by the California Supreme Court was denied October 6, 1971.

The judgment is reviewable under 28 U.S.C. §1257 (3) because it falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". (*Local No. 438 Construction & General Laborers' Union v. Curry* (1963) 371 U.S. 542, 549. See also, *Mills v. Alabama* (1966) 384 U.S. 214, 217-218.)

Question Presented for Review.

DO SCHOOL AUTHORITIES HAVE AN AFFIRMATIVE CONSTITUTIONAL DUTY TO ALLEVIATE PUPIL RACIAL IMBALANCE IN THEIR SCHOOLS REGARDLESS OF ITS CAUSE?

Constitutional Provision Involved.

Amendment XIV, United States Constitution, §1, which provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

This petition seeks the review of a judgment of a California State Court of Appeal which reversed a state trial court judgment of dismissal after the sustaining of a general demurrer to the Attorney General's petition for a writ of mandate against the School District.[1]

On June 3, 1969, the Attorney General filed the petition alleging that the pupil population of School District's schools was racially imbalanced[2] and that such racial imbalance resulted in a denial of equal educational opportunity and violated the Fourteenth Amendment of the Constitution of the United States.[3] [Cl. Tr. pp. 2-3.] The petition sought an order requiring School District to remedy said racial imbalance regardless of its cause. [Cl. Tr. pp. 6-7.]

On July 2, 1969, School District replied by filing a general demurrer contending that the petition did not state facts sufficient to constitute a cause of action

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[1]The San Diego Unified School District is one of the largest urban school districts in the United States. According to the San Diego City Schools Pupil Ethnic Census, 1970-71 (Publ. Jan. 1971) its student population was divided ethnically and racially into the following groups: Spanish Surname 13,603, other white 95,208, Negro or Black 16,013, Oriental 1,918, American-Indian 196, other non white 1,942, for a total population of 128,880. Some 55,663 pupils are enrolled in the district's 33 secondary schools (grades 7-12), and 73,217 pupils in the 122 elementary schools (grades K-6).

[2]The Attorney General's allegations as to this racial imbalance are restated in the Court of Appeal's Opinion. (Appendix, pp. 2-3.)

[3]The petition originally alleged that the racial imbalance also violated "the laws and the policies of the State of California". However, the Attorney General in argument later stated that he was relying solely upon the Fourteenth Amendment to the United States Constitution [Rptr. Tr. p. 13]. This fact was noted in the Superior Court Memorandum Opinion. (Appendix, p. 25.)

because the petition failed to allege that the racial imbalance was the result of any state or local segregation or discriminatory practices.

On November 14, 1969, the Honorable George A. Lazar, Judge of the San Diego Superior Court sustained the School District's general demurrer and granted the Attorney General 20 days to amend.

Judge Lazar correctly concluded:

> "Whatever social criteria might indicate would be the optimum goal with respect to school populations viewed racially, the law is not that the Fourteenth Amendment requires such goal to be achieved as an end in itself or without regard to the manifest difficult collateral questions which enter into the management of school programs, particularly in urban areas. The petition fails to show that the respondent [School District] has a legal duty to 'prevent, alleviate or eliminate racial imbalance' notwithstanding the 'racial imbalance' may be completely free of intended segregation." (Appendix, pp. 33-34.)

On February 9, 1970, after the Attorney General chose not to amend his petition, the San Diego Superior Court entered a judgment of dismissal. [Cl. Tr. pp. 136-137.]

On March 3, 1970, the Attorney General filed a Notice of Appeal and on August 13, 1971, after extensive oral and written arguments had been heard, the Court of Appeal handed down the opinion sought to be reviewed.

The Court of Appeal, reversing the judgment of dismissal, held that the order sustaining the general demurrer was error. It concluded that:

". . . school authorities in California have a constitutional duty to 'take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools *regardless of its cause*' where the imbalance denies the minority group equal educational opportunities." (Appendix, p. 15.) [Emphasis added.][4]

Accordingly, it is now the duty of the San Diego Superior Court [not the Board of Education elected by the people] to determine:

". . . whether the imbalance is of such a degree it affects the educational opportunities of the minority group; whether, under the circumstances, the minority group, in fact, is denied equal educational opportunities; and whether available steps to alleviate the imbalance are reasonably feasible in light of the degree of the imbalance and the practical necessities of governmental operation." (Appendix, p. 16.)

On August 27, 1971, School District petitioned for a rehearing by the Court of Appeal. On August 30, 1971, the Petition for Rehearing was denied.

Thereafter School District filed a Petition for Hearing by the California Supreme Court on September 21, 1971. On October 4, 1971, the Attorney General concurred with the request of the School District that a hearing be granted stating that it was necessary:

"In order to settle the important questions relating to the necessary elements of a cause of

[4]Although the Court of Appeal's decision remanded the case back to the trial court for further proceedings, the above ruling forecloses School District's major legal defense to the action.

> action to compel a school district to comply with its duty to take affirmative steps to alleviate and eliminate racial segregation *from whatever cause* . . . ."[5] (Answer to Petition for Hearing, p. 14.) [Emphasis added.]

Despite this joint request, on October 6, 1971, the California Supreme Court denied hearing.

On October 13, 1971, the matter was remitted to the San Diego Superior Court for further proceedings. On November 8, 1971, a stipulation, signed by both parties, was filed requesting a recall and a stay of reissuance of the remittitur in order to give School District time to prepare and file a Petition for a Writ of Certiorari with the United States Supreme Court. The request was made on the grounds that the case: ". . . involves important questions of constitutional law and a decision by the United States Supreme Court on these issues could materially advance the ultimate determination of the litigation." (Stipulation For Recall and Stay of Issuance of Remittitur, p. 2.) On the same day the Court of Appeal ordered the remittitur recalled and stayed pending the action of the United States Supreme Court on the Petition for a Writ of Certiorari.

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[5]The Attorney General has always attempted to equate the term "racial imbalance" with "racial segregation". In fact, they are not equivalent terms. To segregate is to "separate or set apart from others or from the general mass or mainbody" (*Webster's International Dictionary*, 3rd Ed.) Thus, racial segregation requires an affirmative act of distinguishing, separating, or setting apart or discriminating based on race. Imbalance is "an absence of balance; a disproportion" (*Webster's International Dictionary*, 3rd Ed.) Acts of racial segregation cause racial imbalance but racial imbalance may also exist without *any act* of segregation or discrimination.

Reasons for Granting the Writ.

THE CALIFORNIA COURT IMPROPERLY RULED THAT THERE IS A FEDERAL CONSTITUTIONAL DUTY TO REMEDY PUPIL RACIAL IMBALANCE REGARDLESS OF ITS CAUSE.

A. Pupil Racial Imbalance Which Results From a Former Segregated School System Is Unconstitutional.

In *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483, the United States Supreme Court held that plaintiffs who were denied admission to state public schools attended by white children under state laws requiring or permitting segregation according to race were deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

In accordance with *Brown* and the Supreme Court's later implementation decisions,[6] racial imbalance has been ordered remedied by several Southern courts in an attempt to create a unitary school system where none existed previously and wipe out the last vestiges of state imposed segregation. (*E.g., United States v. Jefferson County Board of Education* (1966 5th Cir.) 372 F.2d 836, *affirmed en banc* (1967 5th Cir.) 380 F.2d 385, *cert. denied* 389 U.S. 840; *Hobson v. Hansen* (1967 D.D.C.) 269 F.Supp. 401, *remanded sub nom. Smuck v. Hobson* (1969 D.C.Cir.) 408 F.2d 175.) See also, *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1 (discussed *infra*, pp. 11-15.)

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[6]*E.g., Brown v. Board of Education of Topeka* (1955) 349 U.S. 294 (requiring all deliberate speed); *Griffin v. County School Board of Prince Edward County* (1964) 377 U.S. 218 (prohibiting the closing of public schools to avoid desegregation); *Green v. County School Board* (1968) 391 U.S. 430 (holding freedom of choice plans an unacceptable substitute for desegregation).

B. Pupil Racial Imbalance Caused by Acts of School Authorities May Be Unconstitutional.

The United States Supreme Court has yet to pass upon a pupil racial imbalance case arising from an area which in the past did not have a dual school system. (*Cf., Gomperts v. Chase* No. A-245, September 10, 1971, Mr. Justice Douglas, Circuit Justice.) Nevertheless, many state and federal courts analogizing some local situations to the dual school system struck down by *Brown* have held that racial imbalance caused by various local discriminatory practices must be remedied. (*E.g., Taylor v. Board of Education of City School District of New Rochelle* (1961 S.D.N.Y.) 191 F.Supp. 181, *Appeal dismissed* (2nd Cir.) 288 F. 2d 600 (S.D.N.Y.) 195 F.Supp. 231, *Affirmed* (2nd Cir.) 294 F.2d 36, *cert. denied*, 368 U.S. 940 (gerrymandering of attendance zones and transfers of white students found to create a racially segregated school); *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (allegations of gerrymandering school attendance zones for racial purposes held to state a cause of action); *United States v. School District 151 of Cook County, Illinois* (1968 N.D. Ill.) 286 F.Supp. 786, *Affirmed* (1969 7th Cir.) 404 F.2d 1125, (N.D. Ill.) 301 F.Supp. 201, *Affirmed* (1970 7th Cir.) 432 F.2d 1147, *cert. denied* (1971) 402 U.S. 943 (teachers assigned on basis of race, school sites selected, attendance zones drawn and students bused for purposes of segregation); *Davis v. School District City of Pontiac, Inc.* (1970 E.D. Mich.) 309 F.Supp. 734, *Affirmed* (1971 6th Cir.) 443 F.2d 573, *cert. denied* (October 26, 1971, No. 71-280) ..... U.S. ..... (finding of purposeful discrimination in selection of new school sites, drawing of zone attend-

ance lines, and assignment of faculty and administrators on a racial basis).)

However, in the instant case there is no allegation that the racial imbalance is based on a state statute requiring or permitting such segregation. Nor is there an allegation that the School District was engaging in any intentional or purposeful act of discrimination.[7] Instead, there is the simple allegation that the pupil population in *some* of the School District's schools is "racially imbalanced". Thus, it is the mere existence of this alleged racial imbalance, not any act of segregation or discrimination that is claimed to be unconstitutional.

C. The Circuit Courts of Appeal Have Uniformly Held That, Absent a Prior History of Segregation or Other Discriminatory Acts, There Is No Constitutional Duty to Remedy Pupil Racial Imbalance.

Every Circuit Court of Appeal which has dealt with the issue of pupil racial imbalance has held that there is no constitutional duty to remedy it when it is not the result of some prior action of segregation or purposeful discrimination.[8] (*E.g., Bell v. School City of*

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[7]It is School District's position that such allegations are necessary to state a cause of action under the equal protection clause of the Fourteenth Amendment. (See *e.g., Snowden v. Hughes* (1944) 321 U.S. 1, 8-9; *Oyler v. Boles* (1962) 368 U.S. 448, 456; *Swain v. Alabama* (1965) 380 U.S. 202, 204-205.) However, recently several state and federal courts have questioned that rule. (*E.g., Serrano v. Priest* (1971) 5 Cal.3d 584, 602-603, 96 Cal.Rptr. 601, 487 P.2d 1241; *Hawkins v. Town of Shaw, Mississippi* (1971 5th Cir.) 437 F.2d 1286, 1291-1292 (rehearing *en banc* granted).

[8]There has been a divergence of opinion in some trial courts. *E.g.*, compare *Blocker v. Board of Education of Manhasset, New York* (1964 E.D.N.Y) 226 F.Supp. 208 and *Soria v. Oxnard School District* (1971 C.D. Cal.) 328 F.Supp. 155, with *Lynch v. Kenston School District Board of Education* (1964 N.D. Ohio) 229 F. Supp. 740 and *Gomperts v. Chase* (1971 N.D. Cal.) 329 F.Supp. 1191.

Gary, Indiana (1963 7th Cir.) 324 F.2d 209, 213, *cert. denied* (1964) 377 U.S. 924 (no constitutional duty to change innocently arrived at school attendance districts merely because shifts in population had increased or decreased the percentage of Negro or white pupils); *Downs v. Board of Education* (1964 10th Cir.) 336 F.2d 988, 998, *cert. denied* (1965) 380 U.S. 914 (no requirement to abandon or destroy the neighborhood school system even though it results in racial imbalance where it was maintained with no intention or purpose to maintain or perpetuate segregation); *Springfield School Committee v. Barksdale* (1965 1st Cir.) 348 F.2d 261, 264 (no requirement to remedy racial imbalance at all costs); *Deal v. Cincinnati Board of Education* (1966 6th Cir.) 369 F.2d 55, 61, *cert. denied* (1967) 389 U.S. 847, (1969 6th Cir.) 419 F.2d 1387, 1390, *cert. denied* (1971) 402 U.S. 962 (no constitutional duty to bus children out of their neighborhoods or transfer classes, or select new schools to alleviate racial imbalance caused not by the school board but by the racial character of the neighborhoods in which the schools were located); see also, *Offermann v. Nitkowski* (1967 2nd Cir.) 378 F.2d 22, 24; *Sealy v. Dept. of Public Instruction of Penn.* (1958 3d Cir.) 252 F.2d 898, 901, *cert. denied* 356 U.S. 975.)

The most recent federal appellate court decision on this issue is *Keyes v. School District No. 1, Denver, Colorado* (1971 10th Cir.) 445 F.2d 990, (*cert. filed* October 8, 1971, Docket No. 71-507, *conditional cross-petition for cert. filed* October 23, 1971, Docket No. 71-572). There the court affirmed the district court's

order requiring that racial imbalance be remedied in those schools where there was a finding of prior discriminatory practices. However, the court reversed the district court's order as to those schools where there was no finding that the imbalance was the result of any prior discriminatory act. The Court stated:

> *"We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue.* [citations omitted]" (445 F.2d at 1005) [Emphasis added.]

D. The California Court Decision Is Inconsistent With the Recent Charlotte Decision.

It is submitted that not only did the California Court in this case rule contrary to the above circuit court decisions, but also, its decision is inconsistent with the United States Supreme Court's ruling in the recent case of *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1. In that case the court in dealing with a case from a former dual school system upheld the power of a federal district judge to use "cross-busing", "pairing", and "grouping" techniques to remove the last vestiges of the dual school system. In addition, however, the court laid down the following guidelines:

(1) *A Unitary School Need Not Be Racially Balanced.*

The appellant school board argued that the District Court order imposed a racial balance requirement of 71%-29% for each of its individual schools. The Su-

preme Court disagreed.[9] It saw the use made of mathematical ratios as no more than a starting point and thus within the District Court's "discretionary powers, an equitable remedy for the particular circumstances". (402 U.S. at 25.)

Moreover the Supreme Court stated:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.*" (402 U.S. at 24.) [Emphasis added.]

(2) *A Unitary School System May Have "One-Race" or Virtually "One-Race" Schools.*

The court stated:

> "No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." (402 U.S. at 26.)

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[9]The Supreme Court noted that the District Court itself had stated: "'This court has not ruled, and does not rule that "racial balance" is required under the Constitution . . . *nor that the particular order entered in this case would be correct in other circumstances not before this court*' (emphasis in original)" (402 U.S. at 25n.9.)

However, the Supreme Court noted that in certain metropolitan areas minority groups are often concentrated in one part of the city and stated:

> "In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law." (402 U.S. at 26.)

(3). *There Is No Duty to Racially Balance Schools in the Absence of a Constitutional Violation.*

The Supreme Court held that where there is a dual school system a court has broad remedial powers including the right to take such drastic steps as gerrymandering of school attendance zones and "pairing" or "grouping".

The Court noted, however:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." (402 U.S. at 28.)

(4) *Establishment of a Unitary School System Satisfies Constitutional Requirements.*

In conclusion the Supreme Court stated:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown* I. The systems will then be unitary in the sense required by our decisions in *Green* and *Alexander*.

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but *in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.*" (402 U.S. at 31-32) [Emphasis added]

Although the *Charlotte* opinion factually involved a former state segregated school system[10], its teachings should have application to all courts, both North and South. (See *e.g., Spencer v. Kugler* (1971 D.N.J.) 326 F.Supp. 1235, 1241, (appeal filed October 9, 1971, Docket No. 71-519). A three-judge federal court held that a complaint which sought inter-district pupil racial

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[10]In *Charlotte* the court stated:

> "We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it." (402 U.S. at 23.)

balancing did not state a claim upon which relief could be granted. The court noted that the *Charlotte* case fully supported its disposition of the plaintiffs' claim.)

The *Charlotte* decision made it clear that when a court finds acts of discrimination, it has great equitable power to fashion an appropriate remedy. However, it is submitted that the opinion made it equally clear that unless there is a finding of specific discrimination, courts should not interfere and order racial balancing.

Conclusion.

THE UNITED STATES SUPREME COURT SHOULD DETERMINE THIS FEDERAL QUESTION OF SUBSTANCE.

For many years the United States Supreme Court has focused its efforts on implementing the *Brown* decision in areas which had a former dual school system. Today that issue has been largely resolved. It is submitted that it is now time to examine the question of pupil racial imbalance arising in areas where there was no state imposed segregation. What should be the role of the courts and what should be the role of the local school authorities in dealing with this problem? It is this question which cries for an authoritative decision.

The Attorney General argues that pupil racial imbalance is *per se* unconstitutional and that the courts should, therefore, mandate its eradication. The Court of Appeal's decision adopts some of this philosophy and relegates school administrative policies to questions of fact to be resolved by trial courts. It is submitted that neither result is required by the Constitution. On the contrary, School District believes that if our educational

system is to work, solutions to problems such as racial imbalance, must come not from the courts, but from those best equipped to resolve these questions: The members and staff of the State Board of Education, the local Boards, and the local school administrators.

Our case presents the issue in its clearest terms. If pupil racial imbalance is *per se* unconstitutional, then there is no need for trial courts to deal with the complex issues outlined by the Court of Appeal's decision. If on the other hand it is not *per se* unconstitutional, this case presents no excuse for having a trial court substitute its own particular concept of educational administration for that of the duly elected and appointed school authorities.

Dated November 10, 1971.

Respectfully submitted,

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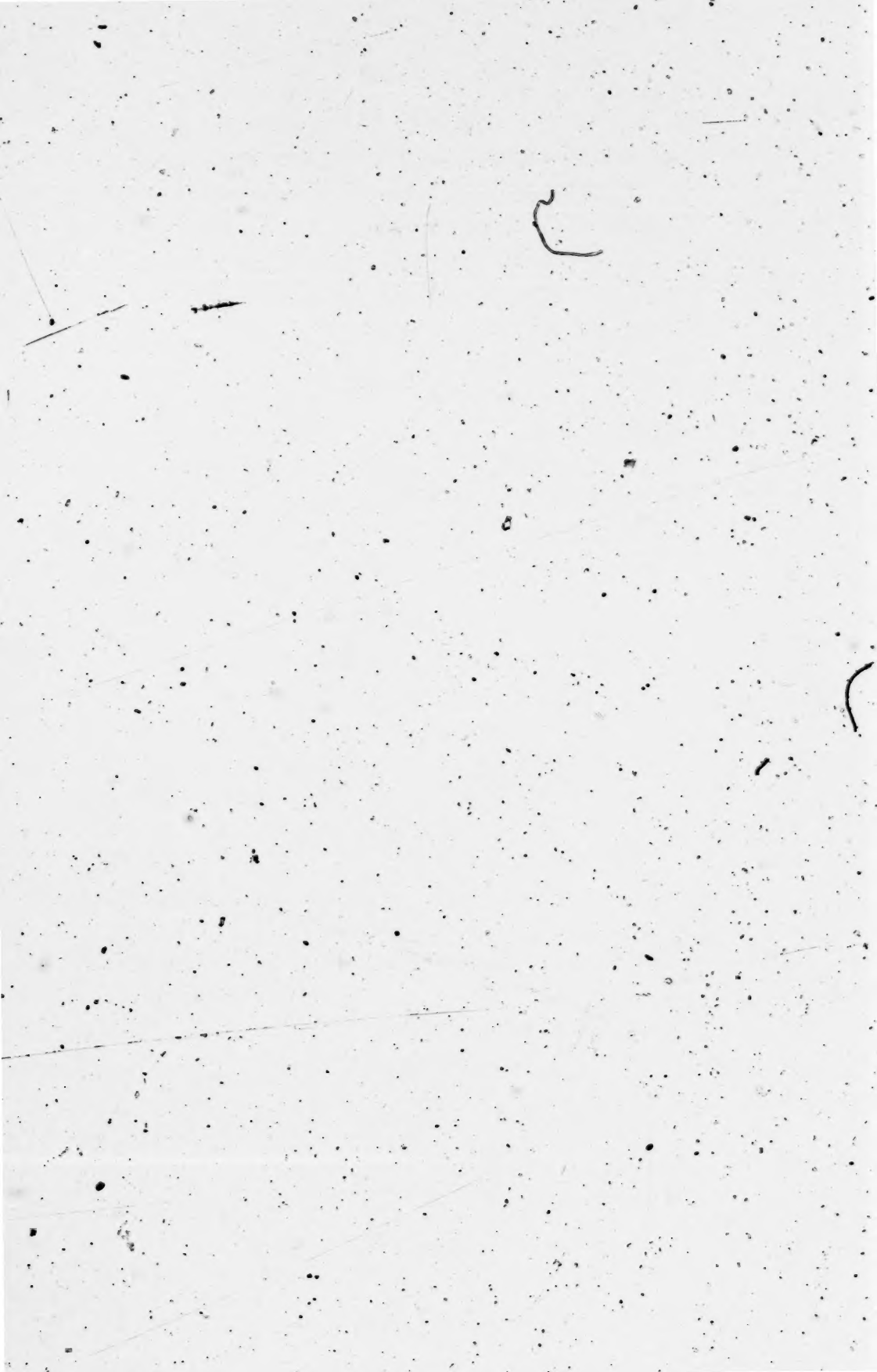

APPENDIX.

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner and Appellant,* vs. SAN DIEGO UNIFIED SCHOOL DISTRICT, *Respondent.*

4 Civ. No. 10335, (Sup. Ct. No. 312080).

Opinion.

Filed: August 13, 1971.

APPEAL from a judgment of the Superior Court of San Diego County. George A. Lazar, Judge. Reversed with directions.

Thomas C. Lynch, Attorney General, Robert H. O'Brien and Andrea Sheridan Ordin, Deputy Attorneys General, for Petitioner and Appellant.

Thomas A. Shannon, Schools Attorney of San Diego Unified School District, Higgs, Jennings, Fletcher & Mack, Pitts Mack and Donald R. Lincoln, for Respondent.

The People of the State of California, acting through the Attorney General, hereinafter referred to as petitioner, appeal from an order dismissing a petition for writ of mandate, directing the San Diego Unified School District, hereinafter referred to as The District, "to exercise its discretion to take reasonably feasible steps to prevent, alleviate and eliminate racial imbalance" in its schools. The District had filed a general and special demurrer to the petition. The court sustained the general demurrer with leave to amend, but did not pass upon the special demurrer. Petitioner did not amend. The order of dismissal followed.

In ruling upon a general demurrer facts expressly alleged in a petition, and also facts supplied by inference or implication from the facts expressly alleged, are deemed true. (*Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 713; *Harvey v. City of Holtville*, 271 Cal. App. 2d 816, 819.) We state the facts in the case accordingly.

The petition classifies the Negro, Oriental, Mexican-American and Indian-American pupils in The District's schools as an ethnic group which is a minority of the total school population. In this opinion, as a matter of convenience, we shall refer to these pupils as the minority group and to the remaining pupils as the majority group.

"Student racial imbalance"[1] exists in The District's schools; the number of racially imbalanced schools is substantial; in 25 elementary, 3 junior high and 4 high schools the ratio between the number of pupils in the minority group in each school and the number of all pupils in the school exceeds by 15% the ratio between the number of pupils in the minority group in the school system and the number of all pupils in the system; and in 54 elementary, 3 junior high and 4 high schools the ratio between the number of pupils in the majority group in each school and the number of all pupils in the school exceeds by 15% the ratio between the number of pupils in the majority group in the system and the number of all pupils in the system.

The existence of student racial imbalance in its schools is known to The District in that (1) a survey in August, 1966, the results of which were set forth in a report to it by its Citizens Committee, showed the Negro pupil population of the schools in the district was 10.7% of the total pupil population whereas there

[1]Quotations in our statement of facts are from the petition.

were 15 elementary, 2 junior high and 2 high schools where the Negro pupil population in each school was over 50% of the total pupil population in the school; (2) the student racial imbalance in The District's schools has not improved since it received the aforesaid report; and (3) a survey made in October, 1968, showed the Negro pupil population of the schools in the district was 12.6% of the total pupil population and the Mexican-American pupil population was 10.1% of the total pupil population whereas in 15 elementary, 2 junior high and 2 high schools the Negro pupil population of each school exceeded 50% of the total pupil population in the school, and in 1 elementary school the Mexican-American pupil population exceeded 50% of the total pupil population in the school.

There are several reasonably feasible plans available to The District for correcting the student racial imbalance in its schools, but The District refuses "to take adequate, reasonably feasible steps, or any steps at all, to prevent, alleviate or eliminate racial imbalance" in The District's schools; and "has, *inter alia*, by a policy of maintaining neighborhood attendance zones and optional attendance zones, and by other devices, perpetuated and extended racial imbalance in its schools, and will continue to do so."

The District's acts and "failure to take reasonably feasible steps to prevent, alleviate and eliminate substantial racial imbalance in its schools resulted in and will continue to result in irreparable injury to the People of the State of California in that attendance at racially imbalanced schools denies students an equal educational opportunity, causes social and pscyhological injury to said students, and thwarts the ability of students to learn and exchange views with other students."

At the outset we consider and reject The District's contention the attorney general lacks standing to bring the action. Our conclusion is premised on the settled rule in California the attorney general is authorized "to file any civil action for the enforcement of the laws of the state or the United States Constitution, which in the absence of legislative restriction he deems necessary for the protection of public rights and interests." (*People ex rel. Lynch v. Superior Court*, 1 Cal. 3d 910, 912, fn. 1.) It is in the public interest to require a school district to comply with the provisions of the United States Constitution guaranteeing equal protection of the laws. There is no legislative restriction in the premises. The District's contention to the contrary is without merit.

In concise summary, the complaint alleges student racial imbalance exists in The District's schools; attendance at racially imbalanced schools denies students equal educational opportunities, causes them social and psychological injury, and thwarts their ability to learn; there are several reasonably feasible plans available to The District to correct the existing racial imbalance in its schools; The District refuses to take steps invoking these plans or any steps to prevent, eliminate or reduce the racial imbalance in its schools; instead, The District by its policies, has perpetuated and extended racial imbalance in its schools.

The issue on appeal is whether the foregoing facts constitute a cause of action in mandamus for an order directing The District to take available, reasonably feasible steps to alleviate the racial imbalance in its schools.

We consider, first, pertinent principles of law; secondly, the sufficiency of the facts alleged in the com-

plaint to state a cause of action in mandate under these principles; and, interjectionally, questions whether the existence of certain material facts is a determination made by the court as a matter of law or is dependent upon a finding on an issue of fact supported by evidence.

In *Brown v. Board of Education of Topeka*, 347 U.S. 483 [74 S. Ct. 686, 691] (*Brown* I), the Supreme Court of the United States held state action effecting racial segregation of children in public schools denies "the minority group" equal protection of the law; violates the Fourteenth Amendment of the Federal Constitution; and is subject to appropriate remedial judical decree. In a later decision in the same case, *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 [75 S. Ct. 753, 755] (*Brown* II), the court referred to its former holding as a declaration of the "fundamental principle that racial discrimination in public education is unconstitutional" to which all "provisions of federal, state, or local law requiring or permitting such discrimination must yield." (See also *Green v. County School Bd. of New Kent Co., Va.*, 391 U.S. 430 [88 S. Ct. 1689].) The *Brown* decisions concerned a school system maintaining separate, racially segregated schools. In *Swann v. Charlotte-Mecklenburg Board of Education*, 91 S. Ct. 1267, 1271, the Supreme Court epitomized its decision in *Brown* I as a mandate "to eliminate racially separate public schools established and maintained by state action." The decision in *Brown* I was premised on the determination, as a matter of law, state enforced segregation of children in public schools solely on the basis of race deprives the "minority group" of equal educational opportunities. (*Brown v. Board of Education of Topeka*,

supra, 347 U.S. 483, 493 (74 S. Ct. 686, 691).) Basic to this determination was the conclusion, also as a matter of law, "separate educational facilities are inherently unequal" because the segregation in public schools of a minority group from a majority group, solely on the basis of race, "generates a feeling of inferiority as to their status in the community that may affect their heads and minds in a way unlikely ever to be undone." (*Brown v. Board of Education of Topeka*, *supra*, 347 U.S. 483, 493-494 [74 S. Ct. 686, 691, 692]; see also *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 880; *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 949.) Hereinafter we consider further the rationale in *Brown I* and its relation to some of the issues at hand.

The principles declared and conclusions reached in *Brown I* have been applied not only to school systems effecting racial segregation by the use of separate schools for separate racial groups, which was the situation in both *Brown I* and *Swann*, but also to those regulating the assignment of students to particular schools in a manner producing an imbalance in the ratio between racial groups in the particular schools when compared with the ratio between the racial groups in the school system. (*Jackson v. Pasadena City School Dist.*, *supra*, 59 Cal. 2d 876; *United States v. Jefferson County Board of Education*, 372 F. 2d 836, 846, fn. 5; *Springfield School Committee v. Barksdale*, 348 F. 2d 261, 262; gen. see *Downs v. Board of Education of Kansas City*, 336 F. 2d 988, 996—Cert. denied 380 U.S. 914 [85 S. Ct. 898]; cf. *Bell v. School City of Gary, Indiana*, 324 F. 2d 209, 212-213—Cert. denied 377 U.S. 924 [84 S. Ct. 1223].)

The mandate of *Brown* I, which is reiterated in *Swann*, is directed to the elimination of segregation in public schools which is the product of state action, i.e., state or local law. The Fourteenth Amendment to the federal Constitution, upon which *Brown* I is predicated, proscribes state action denying equal protection of the law; not individual action or other factors not the product of state action.

In *Swann* the court persistently referred to the segregation to which its decision was directed as "state-imposed", "legally-imposed" or "state-enforced" segregation. (*Swann v. Charlotte-Mecklenburg Board of Education, supra*, 91 S. Ct. 1267, 1274, 1275, 1277, 1278, 1279, 1281.)

The courts have denoted segregation which is the product of state action as "de jure" segregation and that which is the product of factors other than state action as "de facto" segregation. (Gen. see *San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal. 3d 937, 954, 956; *Deal v. Cincinnati Board of Education*, 419 F. 2d 1387, 1388.)

In any event, the segregation of children in public schools on the basis of race is an evil constitutionally proscribed where it is the product, either directly or indirectly, of racially motivated state action. (*Swann v. Charlotte-Mecklenburg Board of Education, supra*, 91 S. Ct. 1267, 1279; *Banks v. Muncie Community Schools*, 433 F. 2d 292, 295; *United States v. School District 151 of Cook County, Illinois*, 404 F. 2d 1125, 1131-1132; *United States v. Jefferson County Board of Education, supra*, 372 F. 2d 836, 875-876; *Holland v. Board of Public Instruction*, 258 F. 2d 730, 732.)

A majority of the courts hold segregation which is not the product of state action intentionally motivated for the purpose of effecting segregation on the basis of race, is not subject to correction by judicial decree as a constitutional law enforcement procedure; a state, including its agencies, does not have an affirmative duty to relieve racial imbalance in its schools which it did not cause; and state action, such as the assignment of students pursuant to a neighborhood school attendance policy, entertained without intent or purpose to effect, maintain or perpetuate racial imbalance in its schools which nevertheless results in such imbalance, is not constitutionally proscribed. (*Banks v. Muncie Community Schools, supra*, 433 F. 2d 292, 294; *Norwalk Core v. Norwalk Board of Education*, 423 F. 2d [illegible], 122; *Deal v. Cincinnati Board of Education, supra*, 419 F. 2d 1387, 1390; *United States v. School District 151 of Cook County, Illinois, supra*, 404 F. 2d 1125, 1130; *Offermann v. Nitkowski*, 378 F. 2d 22, 24; *Board of Education of Oklahoma City Pub. Sch. v. Dowell*, 375 F. 2d 158, 166—Cert. denied 387 U.S. 931 [87 S. Ct. 2054]; *Deal v. Cincinnati Board of Education*, 369 F. 2d 55, 58, 61—Cert. denied 389 U.S. 847 [88 S. Ct. 39]; *Springfield School Committee v. Barksdale, supra*, 348 F. 2d 261, 264; *Gilliam v. School Board of City of Hopewell, Virginia*, 345 F. 2d 325, 328; *Downs v. Board of Education of Kansas City, supra*, 336 F. 2d 988, 995—Cert. denied 380 U.S. 914 [85 S. Ct. 898]; *Bell v. School City of Gary, Indiana, supra*, 324 F. 2d 209, 213—Cert. denied 377 U.S. 924 [84 S. Ct. 1223]; *Kelley v. Metropolitan County Board of Education*, 317 F. Supp. 980, 986; *Keyes v. School District Number One, Denver, Colorado*, 313 F. Supp. 61, 76; *Davis v. School District of City of Pontiac, Inc.*, 309

F. Supp. 734, 742; *Norwalk 'Core v. Norwalk Board of Education, supra,* 298 F. Supp. 213, 224; gen. see *San Francisco Unified School Dist. v. Johnson, supra,* 3 Cal. 3d 937, 857, fn. 26; see also *United States v. Jefferson County Board of Education; supra,* 372 F. 2d 836, 873, 876; *Gompert's v. Chase,* No. C-71 1307-RHS-U.S. Dist. Ct., No. Dist. of Calif.)

Under the corollary to this rule, however, extant de facto segregation intentionally maintained and perpetuated by racially motivated state action becomes constitutionally proscribed de jure segregation. (*United States v. Board of Education, I.S.D. No. 1, T.C., O.,* 429 F. 2d 1253, 1258-1259; *United States v. School District 151 of Cook County, Illinois, supra,* 404 F. 2d 1125, 1130-1131; *Brewer v. School Board of City of Norfolk, Virginia, supra,* 397 F. 2d 37, 41; *Wheeler v. Durham City Board of Education,* 346 F. 2d 768, 774; *Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle,* 294 F. 2d 36, 39—Cert. denied 368 U.S. 940 [82 S. Ct. 382]; *Holland v. Board of Public Instruction, supra,* 258 F. 2d 730, 731; *Kelley v. Metropolitan County Board of Education, supra,* 317 F. Supp. 980, 986; *Spangler v. Pasadena City Board of Education,* 311 F. Supp. 501, 522; *Davis v. School District of City of Pontiac, Inc., supra,* 309 F. Supp. 734, 744; also see gen. *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 91 S. Ct. 1267, 1268.) In *San Francisco Unified School Dist. v. Johnson, supra,* 3 Cal. 3d 937, 958, the court said: When "the state undertakes to preserve de facto school segregation, or to hamper its removal, such state involvement transforms the setting into one of de jure segregation."

The issue of motivation, intent or purpose in the premises is a question of fact. (*United States v. School*

District 151 of Cook County, Illinois, supra, 404 F. 2d 1125, 1131, 1133; *Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle, supra,* 294 F. 2d 36, 38—Cert. denied 368 U.S. 940 [82 S. Ct. 382]; *Davis v. School District of City of Pontiac, Inc., supra,* 309 F. Supp. 734, 744.) The intention to perpetuate existing de facto segregation may be evidenced by adherence to assignment, zoning, school construction, site selection and similar policies effecting this result. (*United States v. School District 151 of Cook County, Illinois, supra,* 404 F. 2d 1125, 1131, 1133; *Brewer v. School Board of City of Norfolk, Virginia, supra,* 397 F. 2d 37, 41; *Wheeler v. Durham City Board of Education, supra,* 346 F. 2d 768, 774; *Spangler v. Pasadena City Board of Education, supra,* 311 F. Supp. 501, 522; *Davis v. School District of City of Pontiac, Inc., supra,* 309 F. Supp. 734, 746; *United States v. School District 151 of Cook County, Illinois,* 286 F. Supp. 786, 798.) On the other hand, the nonexistence of facially oriented motive, intent or purpose attendant upon state action maintaining an existent de facto segregation in schools may be evidenced by such factors as the costs incident to a change, the availability of facilities, or the safety standards of students. (*Banks v. Muncie Community Schools, supra,* 433 F. 2d 292, 293, 294, 296; *Springfield School Committee v. Barksdale, supra,* 348 F. 2d 261, 264; *Bell v. School City of Gary, Indiana, supra,* 324 F. 2d 209, 213; *cf. United States v. School District 151 of Cook County, Illinois, supra,* 404 F. 2d 1125, 1133.)

A minority of the courts hold there is a constitutional duty on the state and its agencies maintaining public schools where de facto segregation exists to remedy

the resultant racial imbalance. (*Kelley v. Metropolitan County Board of Education, supra*, 317 F. Supp. 980, 986; *Spangler v. Pasadena City Board of Education, supra*, 311 F. Supp. 501, 522; *Hobson v. Hansen*, 269 F. Supp. 401, 497, 503-506; *Blocker v. Board of Education of Manhasset, New York*, 226 F. Supp. 208, 226; *Branche v. Board of Education of Town of Hempstead*, 204 F. Supp. 150, 153; *Soria v. Oxnard School Dist.*, Civ. 70,396-HP, U.S. Dist. Ct., Central Dist. of Calif.; see also *Brewer v. School Board of City of Norfolk, Virginia, supra*, 397 F. 2d 37, 42.)

The basis for the difference between the majority and minority rules rests upon a difference in accent upon the reasons for the decision in *Brown* I. The majority rule accents the constitutional condemnation in *Brown* I of segregation which is the product of racially inspired state action. The minority rule accents the determination in *Brown* I that racial segregation in public schools constitutes a denial of equal protection of the law because it denies the minority race in such schools equal educational opportunities. (Gen. see *United States v. Jefferson County Board of Education, supra*, 372 F. 2d 836, 873, 875.)

The consuming course of the decision in *Brown* I was the rejection, as applied to state-imposed public school segregation, of the "separate but equal" doctrine condoning state action effecting racial segregation where the facilities furnished a minority race, although separate from, were equal to the facilities furnished the majority. Rejection of the "separate but equal" doctrine was premised on the determination, as a matter of law, state-imposed racial segregation in schools denies the minority group "equal educational opportunities". There was no issue in *Brown* I respecting

the fact the segregation was state-imposed. The courts adopting the minority rule rely upon the denial of equal educational opportunities determination in *Brown* I as a basis for the conclusion, as a matter of law, racial segregation, regardless of its cause, denies the minority group equal educational opportunities. The racial segregation which *Brown* I determined denied the minority group equal education opportunities, as a matter of law, is state-imposed segregation. It is the racial bigotry of a society evidenced by and incorporated in its state-imposed school segregation that denies the minority race equal educational opportunities. Segregation imposed on a minority race in such a society denies the members of the minority race the educational opportunities attendant upon the association of all races in a school atmosphere which tends to ameliorate rather than to accentuate racial prejudice and its invidious discriminating consequences. From the foregoing we conclude, although under the rule in *Brown* I state-imposed racial segregation in public schools, as a matter of law, denies the minority group equal education opportunities, whether racial segregation in public schools which is the product of factors other than state action denies the minority group equal educational opportunities, may be a question of fact dependent upon the circumstances in the particular case. (*Deal v. Cincinnati Board of Education, supra*, 419 F. 2d 1387, 1393; *Springfield School Committee v. Barksdale, supra*, 348 F. 2d 261, 264; *Keyes v. School District Number One, Denver, Colorado, supra*, 313 F. Supp. 61, 77, 83; *Hobson v. Hansen, supra*, 269 F. Supp. 401, 504.)

The distinction between racial segregation in public schools which is the product of state action, directly or indirectly, and that which is the product of facts or indirectly, and that which is the product of facts other than state action, i.e., the difference between de jure and de facto segregation; was considered by our Supreme Court in *Jackson v. Pasadena City School Dist., supra*, 59 Cal. 2d 876 and *San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal. 3d 937.. *Jackson* concerned the action of a school board intentionally manipulating boundaries of school attendance zones for the purpose of excluding Negroes from attending certain schools; the court sustained the petition of a Negro boy seeking admission to one of these schools, and in the course of its opinion said:

> "Although it is alleged that the board was guilty of intentional discriminatory action, it should be pointed out that even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student *under some circumstances* would be entitled to relief where, by reason of residential segregation, a substantial racial imbalance exists in his school . . . Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause anti-social attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful

> consequences of segregation require that school boards take steps, *insofar as reasonably feasible*, to alleviate racial imbalance in schools regardless of its cause." (Italics ours.) (*Jackson v. Pasadena City School Dist.*, *supra*, 59 Cal. 2d 876, 881.)

The discriminatory action of the school board in *Jackson* clearly was unconstitutional under *Brown* I, and the foregoing statements were not essential to the decision in the case. Nevertheless, the majority opinion in *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 958, declares:

> "This court, in *Jackson v. Pasadena City School Dist.* (1963), 59 Cal. 2d 876 [31 Cal. Rptr. 606, 382 P. 2d 878], . . . took a position squarely in favor of enforcing an affirmative duty to eradicate school segregation regardless of its cause."

In the course of its opinion the court noted and quoted the declaration in *Brown* I that the opportunity for an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (*Brown v. Board of Education of Topeka*, *supra*, 374 U.S. 483 [74 S. Ct. 686, 691].) However, the court concluded:

> "We need not, . . . for the purposes of this case, rely on the affirmative duty to desegregate set forth in *Jackson*."

Not discussed in the opinion, and left for further consideration, was the fact the court in *Jackson* unmistakably qualified the duty of school authorities to take steps to alleviate de facto racial imbalance in schools; preceeded its declaration a student would be entitled to relief where substantial racial imbalance exists in his school by reason of residential segregation, with the

phrase "under some circumstances"; limited the duty to take steps to alleviate the racial imbalance to those "reasonably feasible"; and concluded its opinion with the following statement:

> "School authorities, of course, are not required to attain an exact apportionment of Negroes among the schools, and consideration must be given to the various factors in each case, including the practical necessities of governmental operation. For example, consideration should be given, on the one hand, to the degree of racial imbalance in the particular school and the extent to which it affects the opportunity for education and, on the other hand, to such matters as the difficulty and effectiveness of revising school boundaries so as to eliminate segregation and the availability of other facilities to which students can be transferred." (*Jackson v. Pasadena City School Dist. supra*, 59 Cal. 2d 876, 882.)

Premised on the principles stated in *Brown*, *Jackson* and *San Francisco Unified School District*, and upon other considerations heretofore noted, we conclude school authorities in California have a constitutional duty to "take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause" where the imbalance denies the minority group equal educational opportunities. (*Jackson v. Pasadena City School Dist., supra*; 59 Cal. 2d 876, 881.) The action of school authorities in maintaining de facto racially imbalanced public schools is not a denial of equal protection of the law unless the imbalance denies the minority group equal educational opportunities. (*Deal v. Cincinnati Board of Education, supra*, 419 F. 2d 1387, 1393; *Deal v. Cincinnati Board of Edu-*

cation, supra, 369 F. 2d 55; *Blocker v. Board of Education of Manhasset, New York, supra;* 226 F. Supp. 208, 230; *Springfield School Committee v. Barksdale, supra,* 348 F. 2d 261, 263.) In each case seeking relief from such imbalance the court must determine whether the imbalance is of such a degree it affects the educational opportunities of the minority group; whether, under the circumstances, the minority group, in fact, is denied equal educational opportunities; and whether available steps to alleviate the imbalance are reasonably feasible in light of the degree of the imbalance and the practical necessities of governmental operation.

The issue whether de facto racial imbalance in public schools denies minority students equal educational opportunities poses the more specific issue whether the imbalance, under the circumstances of the particular case, deprives them of educational opportunities they would receive absent such imbalance. The degree of imbalance which in one community may have the effects deplored in *Brown* I, *Jackson* and *San Francisco Unified School Dist.,* in another community may not have these effects. Hopefully in some communities the effect of racial bigotry may have been minimized to the extent the effect of racial imbalance in schools upon the educational opportunities of the minority students attending them is inconsequential.

Where the racial imbalance is de facto, its effect on educational opportunities ordinarily is a question of fact. (*Deal v. Cincinnati Board of Education, supra,* 419 F. 2d 1387, 1393; *Deal v. Cincinnati Board of Education, supra,* 369 F. 2d 55.)

Conformance to constitutional standards does not require school authorities to alleviate every racial im-

balance in public schools. (*Jackson v. Pasadena City School Dist., supra,* 19 Cal. 2d 876, 882.) In *Swann* the court said:

> "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.
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> "
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> "In light of the above, it should be made clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law." (*Swann v. Charlotte-Mecklenburg Board of Education, supra,* 91 S. Ct. 1267, 1280-1281; see also *United States v. Jefferson County Board of Education, supra,* 372 F. 2d 836, 846, fn. 5.)

The declaration aforesaid applies equally to de facto as well as to de jure segregation.

In ruling upon constitutional issues, courts should be hesitant to premise a decision upon facts the existence of which is based on judicial knowledge rather than upon facts the existence of which is proven in a judicial proceeding; lest, in their zeal to protect constitutional rights, they exceed the scope of judicial inquiry and invade the domain of administrative determination. (*Banks v. Muncie Community Schools, supra,* 433 F. 2d 292, 296; *Deal v. Cincinnati Board of Education, supra* 419 F. 2d 1387, 1393; gen. see *Gomillion v. Lightfoot,* 364 U.S. 339, 343-344 [81 S. Ct. 125, 128].; *Branche v. Board of Education of Town of Hempstead, supra,* 204 F. Supp. 150, 153.) In *Swann v. Charlotte-Mecklenburg Board of Educa-*

tion, supra, 91 S. Ct. 1267, 1276, the court cautioned, "it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."

The issue of feasibility, likewise, involves considerations which in many instances are matters of administrative determination rather than judicial decision. Pertinent is the observation of the court in *United States v. Jefferson County Board of Education, supra,* 380 F. 2d 385, 389, fn. 1—Cert. denied 386 U.S. 1001 [87 S. Ct. 1342], that a "de facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie in finding state action and in determining how far school officials must go and how far they may go in correcting racial imbalance. . . . 'A broad-brush doctrinaire approach, therefore, that *Brown's* abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools." Whether available steps to alleviate an existing imbalance are reasonably feasible requires a consideration not only of such matters as the cost involved, the availability and selection of sites, the size of the schools, the effectiveness of zone changes and the safety of students (*Bell v. School City of Gary, Indiana, supra,* 324 F. 2d 209, 212), but also of the relation between these matters, the degree of the existing imbalance, and the effect of the imbalance on educational opportunities under the circumstances. Compliance

with constitutional standards does not require the use of school funds to confer educational opportunities upon a minority group attending de facto racially imbalanced schools, which they do not receive because of the imbalance, at the expense of other essential and equally important educational opportunities conferred equally upon both the minority and majority groups. Whether in a particular case the steps available to alleviate an existing imbalance are reasonably feasible is an issue ordinarily determinable as a question of fact.

Applying the principles of law heretofore considered to the case at bench, we conclude the facts directly alleged in the complaint, and the inferences reasonably deducible therefrom, state a cause of action in mandamus to compel the district to take available reasonably feasible steps to alleviate the existing imbalance in its schools because it is the product of racially motivated state action perpetuating and extending a previously existing imbalance whatever may have been its cause, and also because the existing imbalance, regardless of its cause, denies students of the minority group equal educational opportunities, causes them social and psychological injury and thwarts their ability to learn.

The fact, as alleged, the district by a policy of maintaining neighborhood attendance zones, optional attendance zones and other devices, has perpetuated and extended, and will continue to perpetuate and extend racial imbalance in its schools, and refuses to take available reasonably feasible steps to alleviate the imbalance, supports a conclusion the existing racial imbalance is the product of racially motivated state action; or, stated otherwise, supports the conclusion an as-

sumed previously existing de facto imbalance has become de jure."

The fact, alleged in the complaint directly or by implication, the racially imbalanced schools maintained by the District deny students of the minority group attending them equal educational opportunities, causes them social and psychological injury and thwarts their ability to learn, which can be alleviated by available reasonably feasible steps, supports the conclusion the refusal of The District to take these steps is state action denying these students equal protection of the law.

Encompassed within the scope of the complaint, although not presented adequately by appropriate allegations, is the issue whether the existing racial imbalance in the district's schools is the product of state-enforced racially motivated segregation in residential areas. In California, until the decision in *Cumings v. Hokr*, 31 Cal. 2d 844, the state, through its courts, unconstitutionally enforced covenants preventing the occupancy of real property by members of a minority race. Racial imbalance in schools which, by virtue of neighborhood school attendance, construction or site selection policies, is the product of a state-enforced racial imbalance in residential areas, is constitutionally condemned.* (*San Francisco Unified School Dist. v. Johnson*, *supra*, 3 Cal. 3d 937, 956; *United States v. Board of Educa-*

*Several courts have found allegedly de facto imbalanced schools in fact are de jure imbalanced school systems. (*Spangler v. City Board of Education*, *supra*, 311 F. Supp. 501, 522; *Johnson v. San Francisco Unified School Dist.*, Civ. No. 70 1331-SAW, U.S. Dist. Ct., No. Dist. of Calif.; *Soria v. Oxnard School Dist. Board of Trustees*, Civ. No. 70 396-HP, U.S. Dist. Ct., Central Dist. of Calif.; *Crawford v. Board of Education of the City of Los Angeles*, Los Angeles Superior Court No. 822854, Superior Court of Los Angeles County.)

tion, I.S. D. No. 1, T.C., O., supra, 429 F. 2d 1253, 1258; *Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle, supra,* 294 F. 2d 36, 38; *Spangler v. Pasadena City Board of Education, supra,* 311 F. Supp. 501; *Davis v. School District of City of Pontiac, Inc., supra,* 309 F. Supp. 734, 744.).

Some of the principles of law stated in our opinion are relevant to a trial of the case rather than a determination of the sufficiency of the complaint to state a cause of action. The purpose of stating them is to guide the trial court in its further consideration of the case.

Defendant's demurrer to the complaint was general and special. The order sustaining the general demurrer was error. The court did not rule upon the special demurrer. The complaint is uncertain in many particulars. The court should rule upon the special demurrer, and in the event it is sustained, grant leave to amend.

The conclusions heretofore noted are determinative of the appeal in this case and, for this reason, other contentions raised in the briefs need not be discussed.

The judgment is reversed with instructions to the trial court to set aside its order sustaining defendant's general demurrer and rule upon the special demurrer.

Coughlin, *J.*

We concur:

Brown, *P. J.*

Ault, *J.*

In the Superior Court of the State of California
In and for the County of San Diego.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*	No. 312080
vs.	**Memorandum.**
SAN DIEGO UNIFIED SCHOOL DISTRICT, *et al.*, *Respondent.*	

The People of the State of California have filed a Petition for Writ of Mandate by which the aid of this court is sought to compel the San Diego Unified School District:

(a) "to refrain from taking any action which will have the effect of continuing the racial imbalance now existing in the school system of the schools of San Diego Unified School District;"

(b) "to exercise its discretion to take all reasonably feasible steps to prevent, alleviate and eliminate racial imbalance in the schools of said district;"

(c) "to exercise its discretion to select a plan, insofar as reasonably feasible, for altering attendance zones in a manner which will prevent, alleviate and eliminate the racial imbalance in the schools it administers and to implement that plan" promptly;

(d) "to submit to this court a plan for the prevention, alleviation and elimination of the racially imbalanced condition in the public schools which respondent administers, and a timetable showing the dates by which said conditions will be corrected. . . ."

Respondent School District has filed general and special demurrers to the petition. Capsule description of the general demurrer is that it tests the legal validity

of the action assuming all factual allegations of the petition to be true. The special demurrers raise questions of technical sufficiency not vital to the life of the petition as is the general demurrer.

The petition discloses on its face, and it is admitted in argument, that the action is instituted by the Attorney General of the State on the basis of the responsibility and authority imposed upon and vested in him by that portion of Section 13, Article V of the California Constitution which states: "It shall be his duty to see that the laws of the State are uniformly and adequately enforced." The Attorney General asserts in the petition: "It is the concern of The People of the State of California that school districts take the required affirmative action to ensure equal educational opportunity as required by the Constitution of the United States and the laws and policies of the State of California." (Paragraph 1.) No claim is made by the Attorney General that the State Department of Education or any other governmental agency has directed him or has enlisted his services to file the instant petition. (See Government Code, § 12511.)

The thrust of the petition may be summarized as follows: (1) student racial imbalance exists in the schools of Respondent School District in substantial degree; (2) such racial imbalance is in violation of the Fourteenth Amendment of the U. S. Constitution, of the California Constitution, and of the laws and policies of the State of California; (3) that such racial imbalance has resulted from the policies adopted by Respondent and that no steps have been taken to prevent or otherwise remedy the resulting racial imbalance; (4) that the acts and omissions of Respondent constitute an abuse of its administrative discretion; (5) that the People of the State of California are thus irreparably

injured "in that attendance at racially imbalanced schools denies students an equal educational opportunity, causes social and psychological injury to said students, and thwarts the ability of students to learn and exchange views with other students." (Petition, Paragraph 12.) The petition makes no use of the word "segregation," nor does it allege acts or omissions, tainted by culpable motive or intent.

Respondent School District challenges, by its general demurrer, the authority of the Attorney General to prosecute the petition as an exercise of his common law authority to commence and maintain, of his own volition, actions for the protection of public rights and interests.

> "The attorney-general, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest. (Citing cases.)" (*Calif. Oregon Power Co. v. Superior Court*, 45 Cal. 2d 858, 871.)

Respondent also challenges the sufficiency of the petition to state a valid base upon which this court could found jurisdiction to issue its writ. Respondent, in argument, interprets the thrust of the petition to be a charge of segregation resulting incidentally from the ordinary management and planning of the school system, with the further charge that de facto segregation must be corrected notwithstanding the absence of ulterior motive or venal action amounting to de jure

segregation. Respondent's interpretation is not without reason for close scrutiny discloses no assertion of intentional action or omission to create the racial imbalance alleged to exist.

> "Respondent has failed and refused to take adequate, reasonably feasible steps, or any steps at all, to prevent, alleviate or eliminate racial imbalance in its schools. Respondent has no present plans to take adequate, reasonable feasible steps, or any steps at all, to prevent, alleviate or eliminate racial imbalance in its schools. Respondent has, *inter alia*, by a policy of maintaining neighborhood attendance zones and optional attendance zones, and by other devices, perpetuated and extended racial imbalance in its schools, and will continue to do so unless ordered otherwise by this court." (Petition, paragraph 11.)

Respondent specifically contends that the law does not require it, in the absence of bad faith or intentional conduct, to remedy racial imbalance resulting as side effects from its policies and acts in the performance of its duties in establishing, organizing, and administering the school system.

Petitioner in argument restricted its position to state it relies solely upon the Fourteenth Amendment of the U. S. Constitution, the pertinent portion which is that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The only authoritative case cited by petitioner in application of the Fourteenth Amendment is *Brown v.*

Board of Education of Topeka, 374 U.S. 483, in which the United States Supreme Court struck down the doctrine of "separate but equal facilities" as a sufficient accommodation to the requirements of the Fourteenth Amendment in relation to schools and the educational process and as applied to students categorized by race.

In the words of the opinion the question and answer asked and answered by the court were stated: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." (*Brown v. Board of Education, supra*, p. 493.) However phrased, in final analysis the proposition is that the political philosophy of the United States of America and of the several states does not permit legislative or other governmental differentiation upon the basis of race. Certainly Brown so holds. Does Brown go further to say that if differentiation exists, not by legislative or other governmental fiat but, as a result of circumstances which exist independently of governmental action, then the Fourteenth Amendment *requires* governmental action to eliminate such differentiation? I think not. Two things are certain however. The cases under consideration were concerned only with racial segregation by force of specific law. Also, the only word used in denomination of the condition complained of was the word "segregation." To segregate is "to separate or set apart from others or from the general mass or main body." (Webster's International Dictionary, 3rd Ed.) Segregation implies affirmative action and the proscribed action is the affirmative sanction of law for the practice of segregation.

The view that the opinion in *Brown* intended to go no further than to strike down segregation by legislative fiat based on racial distinctions is substantiated to some extent by reference to question 4 of the questions upon which further argument was requested by the Court, as set out in footnote 13 (*Brown v. Board of Education, supra*, p. 496):

> "'4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> '(a) would a decree necessarily follow providing that, *within the limits set by normal geographic school districting*, Negro children should forthwith be admitted to schools of their choice, or
>
> '(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?'" (Emphasis supplied.)

It is obvious that the court was cognizant of school zoning practices. (Cf. "disestablishing state-imposed segregation", *Green v. County School Board*, 391 U.S. 430, 439, quoted in *U. S. v. Montgomery Board of Education*, 395 U.S. 225, 235 (June 2, 1969) preliminary print.)

Petitioner makes the somewhat sweeping assertion that "Starting with *Brown*, the United States Supreme Court has established a *per se* rule which judges that the social impact of racial segregation or isolation in any form is harmful to society and is in violation of the Fourteenth Amendment." (Memorandum, filed July 10, 1969.) No such all inclusive determination is to be found in the language of the case, and most certainly, whatever breadth of condemnation of educational segregation may be read into it, only segregation

imposed by law was declared to be in violation of the Fourteenth Amendment. Cf. *U. S. v. Monigomery Board of Education, supra,* p. 226-227.)

Petitioner relies also upon *Jackson v. Pasadena City School Dist.,* 59 Cal. 2d 876, which is the only expression of the California Supreme Court available on the problems with which this opinion deals. In Jackson it was necessary to allocate a predominantly white elementary school zone to a junior high school zone because the junior high school which had previously served the elementary school zone had withdrawn from the Pasadena school district. Without going into detail, the school board effected a zoning of the elementary zone so that its children would be channeled into a predominantly white junior high school for the purpose of avoiding a dilution of the predominantly black population of another junior high school whose zone was geographically more logically the one to which the elementary zone should have been attached.

> "This was done for the purpose of instituting, maintaining, and intensifying racial segregation at Washington, relegating to a single junior high school a substantial proportion of all Negro pupils, and permitting most white pupils to avoid attendance at schools where substantial numbers of Negroes are enrolled. As so established, Washington is a racially segregated school which is inherently inferior to other junior high schools in the district."

Petitioner, a Negro student, contended he should be permitted to attend an adjoining junior high school upon the basis the predominantly black junior high school in the zone in which he lived, had been segre-

gated by virtue of the school board action above described. In other words, the segregation resulted from and was intended by the board's action intentionally precluding white children from attending the predominantly black populated school.

The Supreme Court accepted petitioner's theory with these words:

> "The constitutional rights of children not to be discriminated against in school admission on the grounds of race or color cannot be nullified by state action either openly and directly or indirectly by evasive schemes for segregation, and the Fourteenth Amendment is violated where zoning is merely a subterfuge for producing or perpetuating racial segregation in a school. (*Cooper v. Aaron*, 358 U.S. 1, 17 [78 S.Ct. 1401, 3 L.Ed.2d 5, 16]; *Taylor v. Board of Education of City Sch. Dist. of New Rochelle*, 294 F. 2d 36, 39; *Clemons v. Board of Education of Hillsboro*, 228 F. 2d 853, 856 et seq.; *Evans v. Buchanan*, 207 F. Suppl. 820, 824; cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 et seq. [81 S.Ct. 125, 5 L.Ed. 2d 110, 113].) Although in general the federal cases have been concerned with instances of complete or almost complete segregation, it is not decisive that absolute segregation is not present. Improper discrimination may exist notwithstanding attendance by some white children at a predominantly Negro school or attendance by some Negro children at a predominantly white school.
>
> "The boundaries of school zones are normally fixed on a neighborhood basis, and where racial imbalance exists in California schools it is usually caused by the fact that the Negro population

tends to concentrate in certain areas due to economic factors and discrimination in housing. Thus, some schools may have a disproportionately high percentage of Negro students even though there is no intent by school authorities to discriminate against them. Here, however, it is alleged that the existing imbalance has been intensified by purposeful and unreasonable action on the part of the board. The fact that the gerrymandering of the McKinley zone is not alleged to have changed the physical boundaries of Washington or its racial composition does not mean that the gerrymandering did not constitute discrimination against plaintiff and the other Negro pupils at Washington. A racial imbalance may be created or intensified in a particular school not only by requiring Negroes to attend it but also by providing different schools for white students, who, because of proximity or convenience, would be required to attend it if boundaries were fixed on a nonracial basis."

Outside the factual requirements present in Jackson, the court added that:

"Although it is alleged that the board was guilty of intentional discriminatory action, it should be pointed out that even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the

kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."

Measured against the complexity of economic, social and cultural factors which enter into the problem of determining an optimum educational program, it would seem that the quoted dictum offers a too simplistic and too uncritical resolution of the role of local school boards in meeting the problem of racial distribution in schools. Brown and the dictum of Jackson are couched in generalities unsuited to the seriousness of the broad subject.

There is little difficulty in apprehending and accepting the mandate of the Fourteenth Amendment which, in the language of Justice Harlan, requires that "Our Constitution is color-blind, and neither knows or tolerates classes among citizens." (*Plessy v. Ferguson*, 163 U. S. 537. dissent p. 559.) And that concept may readily be applied. Reality is that education is more than a matter of school attendance for majority as well as minority. And the question of the educational benefits to be derived from the adjustment of school

populations is only one of numerous factors which have to be taken into account in planning and achieving the optimum school structure. Everything else being equal, racially proportionate school populations might well be the goal because they would parallel the population of the total community, but the premise doesn't coincide with reality.

Brown employs only the word segregation; Jackson speaks of "segregation" and "racial imbalance." Jackson volunteers the social, rather than legal, concept that "Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior," and seems to suggest that by the simple process of relocating students by race the evil will be abated. Would that the problem were that simple. (See Defining Racial Equality in Education, Cohen, 16 UCLA Law Review, 255.)

Again, Jackson says, "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably possible, to alleviate racial imbalance in schools regardless of its cause." That statement is not an application of the "equal protection" clause of the Fourteenth Amendment; it is a pronouncement that school systems have an inherent and overriding legal obligation to assume responsibility for eliminating the problems of racial diversity. As desirable as it is that the schools employ all the ability at their command to help reach the goals of racial acceptance, equality and adjustment, the Fourteenth Amendment does not provide an automatic panacea for every undesirable social situation.

The equal protection clause of the Fourteenth Amendment was incorporated into our constitutional

system as a politico-socio concept under equivocal circumstances. It has had an equally equivocal history. (The Supreme Court in U. S. History, Warren, Vol. 2, pp. 535-561; The Fourteenth Amendment and the States, Collins; The Bill of Rights, Hand, Chap. II.) Jackson and Brown, insofar as they state law which can be specifically interpreted as guiding and binding this court, say only that school laws or operations which purposely effect racial segregation, to the disadvantage of a minority group, whether directly or indirectly, are a denial of the equal protection of the law and in contravention of the Fourteenth Amendment. Racial disproportion in school attendance resulting incidentally from the making of good faith judgments or from causes beyond the control of the managing authority would seem to be outside its ban. (See 16 Stanford Law Review, 434 et seq.; 51 Calif. Law Review, 810 et seq.; Also, 11 ALR 3rd 780.)

As pointed out earlier, Jackson speaks of both segregation and racial imbalance. Segregation and racial imbalance are not common terms. Segregation is the process of being separated; racial imbalance is a condition (numerically) of inequity. Semantically "racial disproportion" would seem to be perferable to "racial imbalance" to designate numerical racial maladjustment, but the latter term seems to be too extensively used to expect a change. Whatever social criteria might indicate would be the optimum goal with respect to school populations viewed racially, the law is not that the Fourteenth Amendment requires such goal to be achieved as an end in itself or without regard to the manifest difficult collateral questions which enter into the management of school programs, particularly in urban areas. The petition fails to show that the re-

spondent has a legal duty to "prevent, alleviate or eliminate racial imbalance" notwithstanding the "racial imbalance" may be completely free of intended segregation.

The second question is that of the authority of the Attorney General to commence and maintain the proceedings at bench upon his own initiative and judgment. The cases in which the Attorney General has acted in his own right are numerous and in many the right has been sustained, in others it has been denied. Review of those cases leads to the conclusion that the circumstances of the instant case do not bring it within the common-law authority defined earlier in this opinion.

In the field of education pursuant to constitutional and legislative authority, there has been created a State Board of Education and a State Department of Education with the responsibilities and powers set forth in the Education Code. Specific sections of that Code applicable to the immediate questions are as follows:

"§152. *Rules and regulations*

"The board shall adopt rules and regulations not inconsistent with the laws of this State (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the State, and (d) for the government of such other schools, excepting the University of California and the California State Colleges, as may receive in whole or in part financial support from the State.

"The rules and regulations adopted shall be published for distribution as soon as practicable after adoption."

"§153. *Study and plans*

"The board shall study the educational conditions and needs of the State. It shall make plans for the improvement of the administration and efficiency of the public schools of the State."

"§352. *Administration*

"The Department of Education shall be administered through:

"(a) The State Board of Education which shall be the governing and policy determining body of the department.

"(b) The State Director of Education in whom all executive and administrative functions of the department are vested and who is the executive officer of the State Board of Education."

"§363. *Commission on employment discrimination, ethnic distribution and attendance areas*

"The State Board of Education may, upon recommendation of the Director of Education, establish in the Department of Education a commission to assist and advise local school districts in problems relating to racial, religious or other discrimination in connection with the employment of certificated employees. The commission shall also, upon request from a district, advise and assist school districts in problems involving the ethnic distribution of pupils and school attendance areas."

Furthermore, the Department of Education pursuant to the authority of § 152, *supra*, has adopted the fol-

lowing rules and regulations which are set forth in Title 5, California Administrative Code.

"§2010. *State Board Policy*

"It is the declared policy of the State Board of Education that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas and school attendance practices."

"§2011. *School District and State Responsibilities in Preventing and Eliminating Racial and Ethnic Imbalance*

"(a) *School Sites, Attendance Areas and Attendance Practices.* In carrying out the policy of Section 2010, consideration shall be given to factors such as the following:

"(1) A comparison of the numbers and percentages of pupils of each racial and ethnic group in the district with their numbers and percentages in each school and each grade.

"(2) A comparison of the numbers and percentages of pupils of each racial and ethnic group in certain schools with those in other schools in adjacent areas of the district.

"(3) Trends and rates of population change among racial and ethnic groups within the total district, in each school, and in each grade.

"(4) The effects on the racial and ethnic composition of each school and each grade of alternate

plans for selecting or enlarging school sites, or for establishing or altering school attendance areas and school attendance practices.

"(b) *Racial and Ethnic Survey.* The governing board of each school district shall periodically, at such time and in such form as the Department of Education shall prescribe, submit statistics sufficent to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in every public school under the jurisdiction of each such governing board.

"(c) *Determination of Racial and Ethnic Imbalances and Corrective Plans.* For purposes of these regulations, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs by more than 15 percentage points from that in all the schools of the district.

"A district shall study and consider possible alternative plans when the percentage of pupils of one or more racial or ethnic groups in a school differs significantly from the district-wide percentage. A district undertaking such a study may consider among feasibility factors the following:

"(1) Traditional factors used in site selection boundary determination, and school organization by grade level.

"(2) The factors mentioned in subparagraph (a) hereof.

"(3) The high priority established in Section 2010.

"(4) The effect of such alternatives on the educational program."

The Legislature has created an administrative department to which it has delegated the authority to designate policies and practices applicable to the public schools. There can be little argument but that the determinations of the Department of Education as expressed in its duly adopted rules and regulations are binding upon the local school districts throughout the state. Having the authority to establish policies and practices to be followed, it follows that the Department has the authority to determine if such policies and practices are being violated. Thus, within the realm of de facto segregation at least, the Department of Education has a substantial and important role. If this be so, then what is the relationship between the Attorney General and the Department of Education.

The Attorney General is not as a matter of law the lawyer for the Department of Education. (Government Code, §§ 11041, 12511) On the other hand it is little to be doubted that the Department of Education may enlist the services of the Attorney General for the purpose of prosecuting any proceeding which may arise out of a violation of rules and regulations promulgated by that Department. (Cf. Government Code, § 11157)

> "It is, of course, well settled that the organization and government of the public school system is a public matter and governed by the general laws of the state (*Kennedy v. Miller*, 97 Cal. 429 [32 Pac. 558]) and that in case of conflict the general laws of the state control." (*Bd. of Education v. Davidson*, 190 Cal. 162, 166. See: *Hall v. City of Taft*, 47 Cal. 2d 177, 179-183; 29 Opn. Atty. Gen. 82; *Phelps v. Prussia*, 60 Cal. App. 2d 732.)

It becomes apparent that the position of the Department of Education with respect to rules, standards and procedures to be followed concerning racial maldistribution in the schools of the state is a matter of particular concern in any litigation involving that question. Insofar as we are dealing with a question of de facto segregation the importance of that position is pinpointed by the reference in the petition to the actions of the Department of Education which have been carried into the Administrative Code and are quoted above. Quite obviously an anomalous situation exists if the Attorney General were to be in a position of enforcing throughout the state his concept of the policies and standards of the Department of Education independently of that body. In effect two entities would be asserting authority in one field.

As applied to the instant case it would seem that the Attorney General either must allege that he is proceeding upon the relation of the Department of Education or he must join that agency as a respondent for failure to enforce its own rules if he elects to proceed on his constitutional authority.

Both the Attorney General and respondent rely upon *People v. New Penn Mines, Inc.*, 212 Cal. App. 667, on the question of the former's standing to prosecute this proceeding. That case recognizes the common-law authority of the Attorney General (p. 671) but held, in the light of legislation specifically directed toward the problem involved in the litigation and with respect to which certain administrative procedures were required to be observed, that the Attorney General could not maintain the suit to enjoin the public nuisance in disregard of those requirements. At page 675, the court said:

"In our view, the Legislature intended the Dickey Act to provide the exclusive means and procedure by which agencies of the state government, including the Attorney General, are to control water pollution and nuisance. The Legislature did not establish a hierarchy of administrative agencies, a carefully conceived group of artificial definitions, a deliberately designed distribution of powers and a set of administrative procedures with the notion that any branch of the state government—armed only with loosely defined traditional functions—might bypass these elaborate arrangements through the device of an injunction suit. Such a notion would be quite inconsistent with the act's expressed design to achieve 'coordination' and 'regional control' of water pollution. (§13000.)"

The language is applicable to the petition here in that the Legislature has created and delegated to the Department of Education the responsibility of overseeing the school districts of the state and of putting forth policies, rules and standards for their direction or guidance. It is not conceivable that the local school districts should have two masters—the Department of Education and the Attorney General.

In sum—insofar as the subject petition seeks to assert a violation of the Fourteenth Amendment, assuming the right of the Attorney General under his constitutional authority to maintain the proceeding, the allegations do not support the contentions; insofar as the petition seeks to assert violation of a present legal duty to remedy de facto segregation it is insufficient administratively and by lack of authority in the Attorney General to prosecute the proceeding.

The Clerk has been directed this day to enter a minute order sustaining the general demurrer, with twenty days to amend.

DATED: NOV. 14, 1969.

Judge of the Superior Court
GEORGE A. LAZAR